

EVIDENCE: Exhibits - Identity of exhibits - Drug exhibit - Discrepancies in gross weight - Whether sufficient explanation given for variations in weights - Whether scientific evidence necessary - Whether discrepancy in weight ipso facto cast doubt in identity of exhibit - Whether break in chain of evidence

The appellant, charged with the offence of trafficking in 2,831 grams of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952, was sentenced to death by the High Court upon being found guilty as charged. His appeal to the Court of Appeal was dismissed and hence, the present appeal. The appellant's appeal was confined to one ground *ie*, that there existed serious doubt as to the identity of the drug exhibit. The appellant submitted that there were discrepancies in the gross weights of the drug exhibits. The three different gross weights of the drug exhibits alleged by the appellant were, *inter alia*: (i) 3.5 kg given by SP1, the Head of the Narcotics Department at KLIA who found the drugs with the appellant; (ii) 3,720 grams given by SP9, the forensic unit officer; and (iii) 3,703.8 grams given by SP3, the chemist. The appellant further submitted that the mere statement by the investigating officer ('SP7') and SP9, that the weighing scales used by them were not calibrated, without scientific evidence to show that the scales were not accurate, was not good law. The appellant also submitted that there was a break in the chain of evidence in the handling of the drug exhibit as there was no explanation given on the movement of the drug exhibit. In his appeal, the appellant sought to rely on the decision in *Zaifull Muhammad v. PP & Another Appeal* ('Zaifull case') in preference to *Hasbala Mohd Sarong v. PP*. On the other hand, the prosecution submitted that the relevant witnesses had explained the

discrepancies on the drug exhibit unlike in *Zaifull* case. It was submitted by the prosecution that the differences in the weights given was due to the types of weighing machines used by the respective witnesses and as such, there was explanation given for the variations in the weights.

A

Held (dismissing appeal; affirming conviction and sentence)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

B

(1) An exhibit, perceivable by the senses and as distinguished from testimony, is part and parcel of evidence adduced during a trial. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant, not only for its admission as a piece of evidence, but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. (paras 25 & 26)

C

D

(2) The discrepancy in the weight of the drug alone should not *ipso facto* cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. One fact and/or event to consider was whether there was any break in the handling or custody which tantamount to a break in the chain of evidence which, if occurred, should cast doubt in the exhibit as a reliable and trustworthy piece of evidence. (para 27)

E

F

(3) In the instant case, the discrepancies as to the weight of the drugs, although not necessary, were explained by SP1, SP7 and SP9. The obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by SP1, SP7 and SP9 was due to their use of uncalibrated weighing machines as compared to the weight obtained by SP3 who used a calibrated weighing machine. Although their explanations might not have been necessary, the explanation was given or could easily be inferred from their testimonies, unlike in *Zaifull* case where no explanation was available, offered or could be inferred from the facts and circumstances available. Thus, plain reliance on *Zaifull* case was misconceived. (paras 46-51)

G

H

(4) The drug exhibit admitted in evidence in this case was the same as those seized by SP1 at the KLIA. SP1 who marked the drug exhibit before passing it to SP7 testified and

I

- A confirmed that it was the same drug exhibit that he seized from the appellant at KLIA. The unchallenged confirmation by SP1 should be given due consideration in determining that there was no issue of doubt in the identity of the drug exhibit. This was one of the facts and events that formed the foundation not only for the admission in evidence of the drug exhibit but also its reliability and trustworthiness as a piece of evidence. (para 51)
- B

- (5) It was obvious that the drug exhibit was within the custody and care of SP7 during the alleged gap period raised by the appellant. Hence, there was no break in the chain of evidence. Further, there was no challenge by the defence during the trial that SP7 had left the drug exhibit outside his locked steel cabinet after taking them out for photographs and dusting for fingerprint. Such absence of challenge had deprived the prosecution the opportunity of rebuttal by way of police diaries and other relevant documents. Therefore, it was too late to raise the issue at the appeal stage. (paras 52 & 53)
- C
- D

E ***Bahasa Malaysia Translation Of Headnotes***

- Perayu, dituduh dengan kesalahan mengedar 2.831 gram heroin di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, dijatuhkan hukuman mati oleh Mahkamah Tinggi selepas didapati bersalah seperti yang dituduh. Rayuannya ke Mahkamah Rayuan telah ditolak dan dengan itu, rayuan ini. Rayuan perayu dihadkan kepada alasan bahawa terdapat keraguan serius terhadap identiti ekshibit dadah tersebut. Perayu menghujahkan bahawa terdapat percanggahan dalam berat kasar ekshibit dadah tersebut. Tiga berat kasar yang berbeza bagi ekshibit dadah yang didakwa oleh perayu adalah, antara lain: (i) 3.5kg oleh SP1, Ketua Bahagian Narkotik di KLIA yang menjumpai dadah tersebut pada perayu; (ii) 3,720 gram oleh SP9, pegawai bahagian forensik; dan (iii) 3,703.8 gram oleh SP3, ahli kimia. Perayu selanjutnya menghujahkan bahawa kenyataan semata-mata oleh pegawai penyiasat ('SP7') dan SP9 bahawa penimbang yang digunakan oleh mereka tidak dikalibrasikan, tanpa keterangan saintifik untuk menunjukkan bahawa penimbang tidak tepat, adalah tidak mencukupi di sisi undang-undang. Perayu juga menghujahkan bahawa terdapat pemutusan dalam rangkaian keterangan dalam menangani ekshibit dadah kerana tidak ada penjelasan yang diberikan berkaitan dengan pergerakan ekshibit dadah tersebut. Dalam rayuannya, perayu menyandar atas keputusan dalam kes *Zaifull Muhammad v. PP & Another Appeal* ('kes *Zaifull*') berbanding
- F
- G
- H
- I

dengan kes *Hasbala Mohd Sarong v. PP*. Sebaliknya, pihak pendakwaan menghujahkan bahawa saksi-saksi yang relevan telah menjelaskan percanggahan dalam ekshibit dadah dan bukan seperti dalam kes *Zaifull*. Dihujahkan juga oleh pihak pendakwaan bahawa perbezaan dalam berat yang diberikan adalah disebabkan oleh jenis mesin yang digunakan oleh saksi-saksi tersebut dan dengan itu, terdapat penjelasan yang diberikan bagi perbezaan dalam berat tersebut.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

- (1) Sesuatu ekshibit yang boleh diamati melalui deria, dan berbeza daripada keterangan lisan, adalah sebahagian keterangan yang dikemukakan semasa perbicaraan. Kebolehterimaan dan sandaran ke atasnya sebagai suatu keterangan memerlukan analisis fakta berkaitan dengan fakta dan/atau kejadian yang relevan, bukan sahaja untuk kebolehterimaannya sebagai suatu keterangan, tetapi bahawa fakta dan/atau kejadian tersebut mungkin boleh juga disandarkan untuk menguji kebolehterimaan dan kebolehpercayaannya sebagai suatu keterangan.
- (2) Percanggahan dalam berat dadah dengan sendirinya tidak boleh secara *ipso facto* membangkitkan keraguan terhadap identitinya. Terdapat faktor-faktor utama lain untuk dipertimbangkan seperti fakta dan/atau kejadian yang membentuk asas kebolehterimaannya sebagai suatu keterangan. Suatu fakta dan/atau kejadian untuk mempertimbangkan sama ada terdapat apa-apa pemutusan dalam menangani atau kawalan yang membentuk pemutusan dalam rantaian keterangan yang, jika berlaku, akan membangkitkan keraguan dalam ekshibit tersebut sebagai suatu keterangan yang boleh diterima dan boleh dipercayai.
- (3) Dalam kes ini, percanggahan mengenai berat dadah tersebut, walaupun tidak diperlukan, telah dijelaskan oleh SP1, SP7 dan SP9. Penjelasan yang jelas bagi percanggahan dalam berat ekshibit dadah yang diperolehi oleh SP1, SP7 dan SP9 adalah disebabkan oleh penggunaan alat timbang yang tidak dikalibrasi berbanding dengan berat yang diperolehi oleh SP3 yang menggunakan alat timbang yang telah dikalibrasi. Walaupun penjelasan mereka kemungkinan tidak diperlukan, penjelasan telah diberikan atau boleh didapati daripada keterangan mereka,

- A bukan seperti dalam kes *Zaifull* di mana tidak ada penjelasan diberikan, ditawarkan atau boleh didapati daripada fakta dan keadaan yang ada. Oleh demikian, sandaran ke atas kes *Zaifull* semata-mata adalah salah tanggap.
- B (4) Ekshibit dadah yang diterima dalam keterangan dalam kes ini adalah sama dengan yang dirampas oleh SP1 di KLIA. SP1 yang telah menandakan ekshibit dadah sebelum memberikannya kepada SP7 memberikan keterangan dan mengesahkan bahawa ia adalah ekshibit dadah yang sama yang telah dirampasnya daripada perayu di KLIA. Pengesahan oleh SP1, yang tidak dicabar, wajar dipertimbangkan dengan sewajarnya dalam menentukan bahawa tidak ada isu keraguan dalam identiti ekshibit dadah. Ini adalah salah satu fakta dan kejadian yang membentuk asas bukan sahaja untuk kebolehterimaan keterangan ekshibit dadah tersebut malah kebolehpercayaannya sebagai suatu keterangan.
- C
- D
- E (5) Adalah jelas bahawa ekshibit dadah berada dalam kawalan dan jagaan SP7 semasa jurang tempoh seperti yang dibangkitkan oleh perayu. Dengan itu, tidak ada pemutusan dalam rantaian keterangan. Selanjutnya, tidak ada cabaran oleh pihak pembelaan semasa perbicaraan bahawa SP7 telah meninggalkan ekshibit dadah di luar peti besi berkunci selepas mengeluarkannya untuk diambil gambar dan mendapatkan cap jari. Ketiadaan cabaran sedemikian telah menafikan pihak pendakwaan peluang mematahkannya melalui diari polis dan dokumen-dokumen lain yang relevan. Dengan itu, adalah terlalu lambat untuk membangkitkan isu tersebut di peringkat rayuan.
- F

Case(s) referred to:

- G *Butera v. Director of Public Prosecutions* (1987) 62 ALJR 7 (*refd*)
Eng Sin v. PP [1974] 1 LNS 33 FC (*refd*)
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC (*refd*)
R v. Nikolovski [1996] 3 SCR 1197 (*refd*)
R v. Osbourne & Virtue [1973] 2 WLR 209 (*refd*)
R v. Stipendiary Magistrate at Lambeth & Another, Ex parte McComb [1983] 1 All ER 321 (*refd*)
R v. Uxbridge Justices, Ex parte Sofaer & Another (1987) 85 Cr App R 367 (*refd*)
Su Ah Ping v. PP [1979] 1 LNS 100 FC (*refd*)
Tan Yew Choy v. PP [2009] 4 CLJ 245 FC (*refd*)
- H
- I *Thompson v. R* [1918] AC 221 (*refd*)
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC (*dist*)

Legislation referred to:

Dangerous Drugs Act 1952, s. 39B(1)(a)

For the appellant - Hisyam Teh Poh Teik (S Selvi with him); M/s Teh Poh Teik & Co

For the prosecution - Wan Sharuddin (Joy Jothii with him); DPPs

[Editor's note: For the Court of Appeal judgment, please see Lew Wai Loon v. PP [2012] 1 LNS 383.]

Reported by S Barathi

JUDGMENT**Richard Malanjum CJ (Sabah & Sarawak):****Introduction**

[1] The appellant was charged with the offence of trafficking in 2,831g of heroin, a dangerous drug under the Dangerous Drugs Act 1952 ('DDA'). He was arrested at Kuala Lumpur International Airport ('KLIA') on 18 June 2008 at 5.45pm.

[2] On 29 September 2011 the High Court at Shah Alam found him guilty as charged and sentenced him to death.

[3] The Court of Appeal dismissed his appeal on 6 March 2012.

[4] The appellant is now appealing to this court on two grounds. However, at the commencement of the hearing his learned counsel indicated to the court that he would only deal with one issue, namely, the identity of the drug as alleged in the charge preferred against the appellant. He relied on the decision of this court in *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383 ('Zaifull case') in preference to the recent decision of this court in *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 ('Hasbala case').

[5] This judgment is therefore focused on whether the courts below had indeed misdirected themselves on the law in view of the decision in *Zaifull* case.

Background Facts

[6] In summary it was the case for the prosecution that on 18 June 2008 SP1 (ASP Azhar Hashim) and his police party were on duty at carousel "J" of the arrival hall of the KLIA. They were

- A there to observe passengers arriving on Flight MH 741 from Yangon, Myanmar. SP1 saw the appellant who had collected a black bag from the carousel and was dragging it towards the customs examination counter. SP1 stopped the appellant and instructed him to place the bag through the scanning machine.
- B The scan revealed a dark coloured image at the base of the bag. As such SP1 requested the appellant to place the bag on the examination counter. The bag was zipped but not locked. On examination of the contents SP1 found inside the bag some clothing and another empty bag. The appellant was taken to the
- C narcotic office where a thorough examination was carried out.

- [7] At the narcotic office SP1 used a knife to cut open the side of the bag. There was a grey piece of hard paper. Upon cutting the surrounding of the hard paper SP1 found a yellow cello-taped package. SP1 went on to cut open the package and in it he found
- D white powdery substance. On chemical analysis the white powdery substance was found to be heroin, a scheduled dangerous drug as defined under the DDA. Hence the appellant was charged with trafficking in a dangerous drug under s. 39B(1)(a) of the DDA.

- E [8] The prosecution also adduced in evidence that the clothing found inside the bag fitted the appellant and the DNA found on it matched the appellant's DNA.

- F [9] Upon maximum evaluation of the evidence adduced by the prosecution the learned trial judge found a *prima facie* case against the appellant.

[10] It was the finding of the learned trial judge, *inter alia*:

- G Mahkamah menyedari bahawa terdapat perbezaan jumlah berat kasar dadah yang dirampas dalam kes ini, masing-masingnya oleh SP1 (3,500 gram), SP3 (3703.8 gram), SP7 (3,505 gram) dan SP9 (3,720 gram). Keterangan menunjukkan mereka menggunakan alat-alat timbang yang berbeza dan SP7 dan SP9 menyatakan alat timbang yang mereka gunakan adalah tidak dikaliberasi. Mahkamah
- H berpuashati rangkaian kawalan barang kes dadah ini tidak terputus langsung, malah bungkusannya (P57) dicam oleh semua mereka itu.

- I ("The Court recognises that there are discrepancies in the total gross weight of drugs seized in this case respectively by SP1 (3,500 grams), SP3 (3,703.8 grams), SP7 (3,505 grams) and SP9 (3,720 grams). Evidence shows that the weighing scales they used were different and SP7 and SP9 stated that the weighing

scales they used were not calibrated. This Court is satisfied that the chain of custody of the drug exhibits was not broken at all, indeed the packaging (P57) was identified by all of them.”)

A

[11] In his defence the appellant testified that he went to Yangon, Myanmar on 16 June 2008 and stayed at Panorama Hotel. He saw SD2 there to take him for tours. He had met SD2 before in May 2008. And a day after his arrival in Yangon he met a person known to him as ‘Tohfu’ who gave him an empty bag (P8). The appellant said that Tohfu asked him to bring the bag (P8) to Malaysia and to give it to his sister named Angie.

B

C

[12] On 16 August 2008 he returned to Malaysia. He put inside P8 his own bag containing his clothing. On arrival at KLIA the appellant said that he was arrested. The bag (P8) that was supposed to be empty in fact contained drug (heroin) that was carefully hidden inside it.

D

[13] After considering his defence the learned trial judge found discrepancies in the story of the appellant. As such he did not believe it. And having considered the case as a whole the learned trial judge was satisfied that the defence did not cast any doubt in the prosecution’s case and that the prosecution had proved its case beyond reasonable doubt. The appellant was therefore convicted and sentenced for the offence as charged.

E

[14] The Court of Appeal dismissed his appeal against his conviction and sentence. In coming to their decision the learned judges of the Court of Appeal said that after going through the evidence carefully they found that the learned trial judge did not misdirect himself on the law. The sole issue before the Court of Appeal was whether the learned trial judge erred in applying the double statutory presumptions under the DDA.

F

G

Appeal Before This Court

The Contentions

[15] As indicated earlier, at the commencement of the hearing of this appeal learned counsel for the appellant decided to confine his argument on this ground, namely:

H

That the prosecution cannot be said to have proven its case beyond reasonable doubt as there exists serious doubts on the identity of the drug exhibits.

I

- A [16] Learned counsel premised his submission on the ‘discrepancies in the gross weights of the drug exhibits’. He highlighted that there were three different gross weights of the drug exhibit allegedly found with the appellant, namely:
- B (i) the gross weight given by SP1 (ASP Azhar Hashim Ketua Bahagian Siasatan Jenayah Narkotik KLIA) in his oral evidence was 3.5kg;
- (ii) the gross weight given by the Forensic Unit Officer (SP9 - Chief Inspector Mazli Jusoh) was 3,720g; and
- C (iii) the gross weight given by the chemist (SP3 - Maimonah Sulaiman) was 3,703.8g.
- D [17] Due to the weight discrepancies learned counsel submitted that the ‘weight difference between SP1 and the chemist is 203.8g whilst the weight difference between SP1 and SP9 is 220g. There is no credible explanation with regard to the discrepancies and on this point alone the case for the prosecution collapses.’
- E [18] He went on to say that ‘(T)hough both SP7 and SP9 said that the weighing scales that they used were not calibrated, this mere statement is not good in law as the prosecution must adduce scientific evidence to show that the weighing scales were not accurate: see *Tan Yew Choy v. PP* [2009] 4 CLJ 245. ... In any
- F event, there was no explanation from SP1. The discrepancy between the weight obtained by him and that of the chemist is huge.’
- G [19] It was also submitted that there was a break in the chain of evidence in the handling of the drug exhibit. The cut was left open and there was nothing said whether the ‘bungkusan’ was kept in check while with the police. There was no explanation given on the movement of the drug exhibit or where they were kept from 19 June 2008 to 24 June 2008 and from 24 June 2008 to 26 June 2008. As such the markings on the drug exhibit was
- H not conclusive due to the huge differences in the weights given by the relevant witnesses.
- I [20] Learned counsel for the appellant relied on the decision of this court in *Zaifull* case. He argued that *Hasbala* case could be distinguished since there was no break in the chain of evidence in that case unlike the present case. Further, in *Hasbala* case there was no challenge in the handling of the drug exhibit. As such the weight of drugs was immaterial.

[21] In reply, learned Deputy Public Prosecutor submitted that the relevant witnesses had explained the weight discrepancies of the drug exhibit unlike in *Zaifull* case. He said that the weights given by SP1 and SP7 (Inspector Mohd Firdaus bin Ali - the investigating officer) were the same. SP1 testified that he weighed the drug exhibit merely to get the estimated weight while SP7 said that he weighed them to check on the weight given by SP1. SP7 added that he used the department weighing machine but he was not sure whether it was calibrated. SP9 also weighed the drug exhibit using a weighing machine that was usually used in shops. It was not calibrated. Only SP3 used a calibrated weighing machine.

A

B

C

[22] Thus, the learned deputy argued that the differences in the weights given was due to the types of weighing machines used by the respective witnesses. As such he submitted that there was explanation given for the weight variations.

D

[23] It was also argued that the facts of *Zaifull* case should not be compared with the present case where the drug exhibit was not in granular form. Learned deputy contended that the crucial issue should be whether there was a break in the chain of evidence when handling the drug exhibit.

E

The Analysis

(i) Overview

F

[24] Now, put simply it was the contention of learned counsel for the appellant that the identity of the drug exhibit produced (P.57) during the trial was in doubt. Due to the differences in the weight given by the relevant witnesses P.57 could not be the same alleged drug seized by SP1.

G

[25] In considering the contention of learned counsel for the appellant it is essential to first appreciate that an exhibit, perceivable by the senses and as distinguished from testimony, is part and parcel of evidence adduced during a trial. (See: *R v. Uxbridge Justices, Ex parte Sofaer & Another* (1987) 85 Cr App R 367; *Butera v. Director of Public Prosecutions* (1987) 62 ALJR 7; *R v. Stipendiary Magistrate at Lambeth & Another, Ex parte McComb* [1983] 1 All ER 321). It is real evidence as opposed to demonstrative or testimonial evidence. And evidence is the means by which a fact in issue is proved. (See: *R v. Osbourne & Virtue* [1973] 2 WLR 209; *Thompson v. R* [1918] AC 221). Further, before an exhibit is admitted into evidence the foundation for its admission

H

I

- A must be established. Such foundation may be in the form of a fact or event that occurred and providing the reliability and trustworthiness of the exhibit as a piece of evidence. (See: *R v. Nikolovski* [1996] 3 SCR 1197 (Canada)).
- B [26] In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or
- C events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.
- D [27] Accordingly in the present case, we would say that discrepancies in weight alone of an exhibit such as drug should not *ipso facto* cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. One fact and/or event to consider is whether there is any break in the handling or custody, which tantamount to a break in the chain of evidence.
- E If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence. (See: *Su Ah Ping v. Public Prosecutor* [1979] 1 LNS 100; [1980] 1 MLJ 75; *Eng Sin v. Public Prosecutor* [1974] 1 LNS 33; [1974] 2 MLJ 168).
- F (ii) The *Zaifull Case* And *Hasbala Case*
- G [28] In view of the heavy reliance on *Zaifull* case by learned counsel for the appellant we are of the view that the pertinent facts and circumstances of that case as narrated in the judgment should be reproduced *in toto* and considered in this judgment. The facts read:
- H On 8 December 2004, at a food stall at Simpang Empat, Kampung Delik, Klang, Chief Inspector Loi Yew Lik (“PW4”) was introduced to the second appellant by his informer. The informer left the scene immediately after the introduction. In that introduction, PW4 introduced himself to the second appellant as “Alex”, a businessman running a pub in Sunway, Petaling Jaya. The second appellant introduced himself as “Osama”.
- I PW4 negotiated with the second appellant for the purchase of proscribed drugs from the second appellant. PW4 asked for 3kg of cannabis from the second appellant, but the second appellant refused to supply that amount as he was apprehensive about it, since he had never dealt with PW4 before. Instead, the second

appellant offered only 1kg of cannabis to PW4. The second appellant told PW4 that the drug was of a high quality and fixed the price at RM2,700, which PW4 agreed. PW4 showed the money to the second appellant. However, the second appellant asked PW4 to meet him later at 7pm on the same day and place. The negotiation was conducted in Malay. Based on that negotiation, PW4 went back to his office at the Police Headquarters in Shah Alam and briefed his men. They then, arranged for an ambush to be carried out during the forthcoming meeting between PW4 and the second appellant.

A

B

At 6.30pm that evening, PW4 waited in his car at the agreed place. He was alone in the car. At 7pm, PW4 saw a car, a Proton Iswara bearing registration No. BHC 4964 approaching his car and stopped about 15 meters from where he was waiting.

C

Then, the second appellant came out from the front passenger door of that car and walked towards PW4's car. The second appellant asked PW4 to get into his car to take the drug, but PW4 refused. The second appellant then went back to his car.

D

Two minutes later, the second appellant came out of his car and walked towards PW4's car. The second appellant got into PW4's car and told PW4 that his friend would fetch the drug while he and PW4 would wait there. PW4 agreed with that plan.

E

Later, the second appellant asked PW4 to drive to Taman Melawis in Klang, where he said his friend would deliver the drug.

F

PW4 agreed and drove to that place. Near the junction heading towards Taman Melawis, PW4 stopped his car. Five minutes later, PW4 saw the same Iswara car driven by a Malay man driving slowly past his car. The second appellant asked PW4 to follow the Iswara car, which he did.

G

After a while, the Iswara car stopped by the roadside. PW4 stopped his car right behind the Iswara car. The second appellant then went out from PW4's car and got into the Iswara car.

H

One minute later, the second appellant came out from the Iswara car and got into PW4's car. The second appellant told PW4 that his friend wanted the money to be paid first before PW4 could take delivery of the drug. PW4 did not agree to that and told the second appellant that he wanted to see the drug first. PW4 asked the second appellant to bring the drug to him. The second appellant then told PW4 that he had personally seen the drug inside the Iswara car. The second appellant went back to the Iswara car, to take the drug.

I

- A When the second appellant got into the Iswara car, PW4 then gave the pre-arranged signal, that is by pressing on the brake lights of his car, to the police ambush party to act. Thereupon, the police ambush party descended on the Iswara car. A police Pajero vehicle blocked the path of the Iswara car. PW4 rushed out of his car and arrested the second appellant. Chief Inspector
- B Mohd Husni bin Manaf ("PW5") arrested the driver of the Iswara car, who was later identified as the first appellant.
- PW4 then conducted a search inside the Iswara car.
- C Underneath the front passenger seat of the car, PW4 found a white plastic bag with the words "Mobil Mart" printed on it.
- Inside that bag, PW4 found a slab of compressed cannabis ("satu ketulan mampat dadah ganja") wrapped in transparent plastic and aluminum foil.
- D On the back seat, PW4 found a small black bag with the words "Bahagian Pembangunan Kesihatan Keluarga Kementerian Kesihatan". Inside that black bag, PW4 found a small package of cannabis ("satu mampatan kecil ganja") wrapped in yellow cellotape and yellow plastic. The first and second appellants, together with the packages seized, were all brought to IPD Klang.
- E Before handing over the seized items to the investigating officer, Chief Inspector Ahmad bin Mohd Rambli ("PW8"), PW4 marked those items for identification, by signing his signature and writing the date '8 December 2004' coupled with other markings.
- F The seized items were sent to the government chemist for analysis. The government chemist, PW2 confirmed that they were cannabis as defined in s. 2 of the DDA, having a net weight of 799.4g.
- [29]** Upon the defence being called by the trial court the
- G appellants gave their respective defences. For the first appellant his defence as reported in the judgment was this:
- The first appellant denied any knowledge of the drug found in the Iswara car. He said, the Iswara car belonged to his father.
- H That night, he borrowed his father's car to pick up and send the second appellant to his workplace at the Marine Department Port Klang. On their way, the second appellant received a phone call and requested to be dropped off at Simpang Empat, Kampung Delik, Klang to meet a friend.
- I After dropping off the second appellant, the first appellant received a phone call from a friend by the name of Madin. Madin wanted to see the first appellant in a restaurant at Melawis, Klang. He

claimed, he met Madin at the restaurant. Madin borrowed the Iswara car for about 1/2 an hour, while he waited at the restaurant.

A

After Madin returned the car to him, he went off to pick up the second appellant, from where he had dropped off the second appellant earlier. But on his way, he was stopped by the second appellant who was inside PW4's car. He then stopped his car in front of PW4's car.

B

Then, he saw the second appellant coming out from PW4's car and walked towards his car. The second appellant told him to wait for a while. Then, the second appellant went back to PW4's car. A short while later, the second appellant walked back to his car and got into the car.

C

Once inside, the second appellant asked him to send him to his work place. When he was about to engage the car into the first gear, a Pajero jeep suddenly intercepted his path and blocked his car.

D

A number of persons came out from the Pajero. They were all not wearing police uniform. The first appellant thought that they were robbers. The first and second appellants were pulled out of the car and were brought behind the car and made to sit on the road side. Then, one of the members of the raiding party, who identified himself as a police officer, told him he wanted to conduct a search. They could not see what was happening inside the car as they were sitting behind the car, facing the opposite direction. 20 minutes later, a Chinese gentleman approached the first appellant showing a package. He put that package on the roof of the car and asked the first appellant, what was in that package. The first appellant said he had no knowledge of the contents of the package. He then told the first appellant, "Ini barang salah ...". The first appellant was shocked and scared. He asked the police, where was the package found. The police said, it was found inside the car. They were subsequently brought to Shah Alam Police Station. Later on, the first appellant was brought to his house and a search was conducted in his house, but nothing incriminating was found.

E

F

G

H

[30] For the second appellant his defence was this:

The second appellant also denied any knowledge of the drug. He admitted he met PW4 on the morning and later at night on the day in question. However, at those meetings, they were merely chit-chatting about their common interest, ie, fishing while having teh tarik. He denied negotiating for the sale of any drug with PW4. He said, he was introduced to PW4 by his friend Sabri at a stall.

I

A And on the material date, initially, he took a ride in the first appellant's car to his workplace. But on the way, Sabri called him to go over to the stall.

B The first appellant dropped him off at the stall where he met Sabri and PW4. They chit chatted about fishing. Since the first appellant did not turn up to pick him up as promised, the second appellant asked PW4 to drive him to his workplace. On the way, the first appellant called and told him that he was at Taman Melawis. Then, he saw the first appellant's car overtaking their car and stopping in front of PW4's car. He then went over to the first appellant's car to thank him, but all of a sudden, a Pajero jeep blocked the first appellant's car and arrested them.

[31] The trial judge convicted the appellants and the Court of Appeal dismissed their appeals.

D [32] The appellants raised in total six grounds in his appeal to this apex court with one common ground that read: 'there are serious doubts as to the identity of the drug exhibit'.

E [33] Before the trial judge the charge preferred against the two appellants read:

F Bahawa kamu bersama-sama, pada 8 Disember 2004, lebih kurang jam 7.45 petang di Jalan Emas, Taman Melawis, di dalam daerah Klang, di dalam Negeri Selangor Darul Ehsan, untuk mencapai niat bersama kamu, telah didapati memperedarkan dadah berbahaya iaitu seberat 799.4 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 dibaca bersama-sama seksyen 34 Kanun Keseksaan.

G [34] However, the original charge preferred against them before the Magistrates' Court read:

H Bahawa kamu bersama-sama pada 08/12/2004 jam lebih kurang 7.45 petang, di tepi Jalan Emas, Taman Melawis, di dalam Daerah Klang, di dalam Negeri Selangor bukan seorang yang diberi Kuasa di bawah Akta Dadah Berbahaya 1952 atau mana-mana Peraturan di bawah Akta tersebut telah didapati di dalam jagaan dan kawalan kamu [6] ketulan mampatan daun kering yang disyaki Ganja 880 gram [berat kasar], oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 39B(1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama (Pindaan 1980).

[35] It was therefore not surprising when dealing with the common ground the learned Chief Justice in delivering the judgment of the court said this:

[32] We are of the view that in present case, there exist material **discrepancies in the gross weight** of the cannabis mentioned in the **original charge compared to the evidence of PW2**. Other than that, there also exist *material discrepancy in the number of “ketulan” mentioned in the original charge compared to the number of “ketulan” as testified by PW4, PW8 and PW2. The gross weight and the number of “ketulan” of the drug exhibit certainly go to the identity of the drug exhibit*. How else can the identity of the drug exhibit be established. Therefore, any serious discrepancies on the gross weight and the number of “ketulan”, unless satisfactorily explained, in our view will go to the question of identity of the drug exhibit.

...

[35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit.

In the circumstance, the defence should not have been called at the close of the prosecution case.

...

[37] ...In our view, it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit. In any event, in the present case the discrepancies are not only as regard to the gross weight but also as to the number of “ketulan”. In our view, these are material discrepancies that go to the issue of identity of the drug exhibit. In the circumstances, therefore, it cannot be said that there is no break in the chain of evidence. On that premise, we hold that it would not be safe to uphold the convictions.’ (emphasis added).

[36] We agree entirely with the proposition stated in *Zaifull* case that ‘... **in the circumstance of this case**, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit.’ (emphasis added).

A [37] However, while it is advisable for the prosecution to give
some explanations for the discrepancies in the description of an
exhibit such as its weight, as we have said earlier, the foundation
for its admission into evidence that may have a bearing on its
reliability and trustworthiness as a piece of evidence should also
B be duly considered when determining if indeed an explanation is
essential to clear any doubt that may arise as to the identity of
the exhibit.

C [38] Thus, in *Zaifull* case the pertinent matters taken into account
were:

- (i) the unexplained glaring discrepancies stated in the charges
preferred before two different courts as to the weights and
total number of ‘ketulan’ (slabs) of the drugs seized; and
- D (ii) the discrepancies in weights of the drugs and the total number
of ‘ketulan’ given by PW4, PW8 and PW2 were not explained
or clarified either by those witnesses or other witnesses *vis-à-vis*
the charges preferred in the Magistrates’ Court and the
trial court respectively.

E [39] Accordingly, in view of the stark unexplained discrepancies
while devoid of any facts and events that led to the admission of
the seized drugs as exhibits, we agree that in the circumstances
of that case there was no necessity to further consider the issue
F of chain of evidence since the facts and circumstances were self-
evident on the doubt in the identity of the drugs seized.

G [40] It was also submitted before us that the decision in *Zaifull*
case was in conflict with *Hasbala* case, a subsequent decision of
this court pertaining to the same issue of weight discrepancies of
drugs seized.

H [41] With respect, *Hasbala* case had carefully considered *Zaifull*
case. From the judgment in *Hasbala* case it was obvious that the
facts and circumstances of that case set it apart from *Zaifull* case.
Further, in *Hasbala* case the foundation for the admission in
evidence of the drug seized was also duly considered. This was
how the learned President of the Court of Appeal put it:

I In *Zaifull Muhammad*, there were two material discrepancies, one
as to the number of “ketulan” and the other as to the gross-
weight of the cannabis. In the original charge, it was stated the
Appellant was in custody of and control of six (6) “ketulan” of
cannabis, and gross weight was 880 grams. But the evidence led

by the prosecution was in relation to two “ketulan”. The police witnesses PW4 and PW8 consistently spoke of only two “ketulan” of cannabis and no one ever mentioned six “ketulan” as stated in the original charge. The chemist, who received the drug exhibits from PW8 also spoke of two “ketulan” as opposed to six “ketulan”. He found the gross-weight of the two “ketulan” of cannabis to be 829.49 grams.

A

B

Thus, in *Zaifull Muhammad* the discrepancies were not only on the gross weight of the drugs exhibits but also on the number of slabs. The discrepancies were never explained by the prosecution. And it was under those circumstances that this Court held that the unexplained discrepancies had created a reasonable doubt as to the identity of the drug exhibits and the defence should have not been called at the close of the prosecution’s case.

C

The facts and circumstances in the present case is distinguishable from *Zaifull Muhammad*. In the present case, while it is true that the chemist had in the chemist report stated that the five slabs of drug exhibits that she received from SP6 were wrapped in aluminum foil reinforced by adhesive tape but she corrected it while giving evidence in court by stating that the five slabs of drug exhibits were wrapped with transparent plastic. She also applied to the Court to have the Chemist Report P8 amended by substituting the word aluminum foil with transparent plastic. The amendment was allowed with no objection by the defence counsel. In this regard it is pertinent to note that the identity of the drug exhibits was never an issue before the High Court as well as the Court of Appeal. There was no challenge as to the identity of the drug exhibits by the defence.

D

E

F

We are of the view that, with the amendment as well as the correction made by SP3; and, in the absence of any challenge by way of cross-examination on the identity of the drug exhibits, the issue of discrepancies on the manner in which the five slabs of drug exhibits were wrapped is devoid of any merit.

G

Thus, the only issue left is whether the unexplained difference between the gross-weight of the drug exhibits as found by PW6 and that of PW3 is sufficient to create a reasonable doubt to the prosecution’s case. On the facts and circumstances of this case, we answer the issue raised in the negative. In this case PW4, and PW6 had clearly identified the drug exhibits that were produced before the High Court. Both PW4 as well as PW6 had identified the markings that they had made on the exhibits including the date and the signatures they placed on the 5 slabs of the drug exhibits. PW3 too had identified the markings as found on the exhibits when she received it from PW6.

H

I

- A Having regard to the evidence of PW4, PW6 and PW3, learned counsel's contention that the drug exhibits produced before the High Court might not be the same as the one seized by PW4 from the Appellant is, in our view, misconceived. On the evidence adduced, we are not in doubt that the drug exhibits seized and
- B same drug exhibits that were produced before the High Court upon which the Appellant was charged. There was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drug exhibits.

- C [42] Thus, for the reasons given in *Hasbala* case we do not think it can be said that it is in conflict with *Zaifull* case. Each of the cases must be considered based on its peculiar facts and circumstances including the facts and events that formed the foundation for the admission in evidence of the drug exhibits. Indeed, the foregoing view expressed by the learned President
- D reinforces our earlier opinion that the issue of identity of drugs exhibit is very much fact sensitive.

Findings Of This Court

- E (i) Identity of the drug exhibit
- F [43] Reverting to the present case it was the submission of learned counsel for the appellant that this case could be distinguished from *Hasbala* case which did not have a break in the chain of evidence. The issues presented in this case involved not only the weight differences but also the periods when custody and care of the drug exhibit could not be accounted for.
- G [44] We will deal first the issue of differences in the weight of the drug exhibit.
- H [45] In relation to the differences in the weight given, the respective relevant witnesses gave their versions of the event including the reasons for weighing the drug exhibit.
- I [46] SP9 made it clear that a bag together with the drug exhibit were given to him by SP7 for fingerprint tracing. Upon receipt he used an uncalibrated weighing machine to weigh the drug exhibit. He took the weight in relation to tracing for fingerprint. He learned from a course he attended that the weight of a thing could affect the result in determining fingerprint on it. Thus, the weight he obtained was immaterial in determining the offence the appellant would finally be charged with. Hence, there was actually no necessity for him to explain. Nevertheless his explanation on

the weight issue could be inferred from the fact that he used uncalibrated weighing machine. Further, there was also no challenge that he received the drug exhibit from SP7. A

[47] As for SP7 he said that he received the drug exhibit from SP1. Again there was no serious challenge on this issue. SP7 weighed them merely to countercheck on the weight as given by SP1. He was not sure whether the weighing machine he used was calibrated. Being the investigating officer it would be necessary for SP7 to know the estimated weight of the drug seized by SP1 as the weight would assist him to determine the nature of the offence committed and the course to take in his investigation of the case. B C

[48] The person who seized the drug exhibit and other items from the appellant was SP1. Before passing the same to SP7 he marked the items seized and he also weighed the drug exhibit, an exercise that was not necessary for him to do. As such the weight he obtained was also immaterial. Thus, there was no necessity for him to explain on the discrepancy between the weight he obtained and the weight obtained by SP3. Nevertheless, the use of uncalibrated weighing machine easily explained for the weight discrepancy. D E

[49] There was no dispute that SP3, the chemist who analysed the seized drug used calibrated weighing machine to determine its weight. F

[50] Thus, the obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by SP1, SP7 and SP9 was due to their use of uncalibrated weighing machines as compared to the weight obtained by SP3 who used a calibrated weighing machine. And although their explanations might not have been necessary as stated earlier, nevertheless explanation was given or could easily be inferred from their testimonies unlike in *Zaifull* case where no explanation was available, offered or could be inferred from the facts and circumstances available. In fact in the present case this weight issue was also considered by the learned trial judge and he ruled that there was no break in the chain of evidence thus rendering the weight issue immaterial in coming to his decision. G H

[51] We are therefore of the view that plain reliance on *Zaifull* case without more by learned counsel for the appellant was misconceived. Accordingly we find that the drug exhibit admitted in evidence in this case was the same as those seized by SP1 at I

- A KLIA. Indeed SP1 who marked the drug exhibit before passing it to SP7 testified and confirmed that it was the same drug exhibit that he seized at KLIA. This unchallenged confirmation by SP1 should be given due consideration in determining that there was no issue of doubt in the identity of the drug exhibit. Indeed in
- B our view this is one of the facts and events that formed the foundation not only for the admission in evidence of the drug exhibit but also its reliability and trustworthiness as a piece of evidence.
- C [52] As regards the gap periods (18-24 June 2008 and 24-26 June 2008) highlighted by learned counsel for the appellant we note that learned trial judge had considered and made a factual finding that there was no break in the chain of evidence. SP1 said that after marking the drug exhibit and other items seized from the
- D appellant he handed the same to SP7 (the investigating officer) on 18 June 2008 at around 11 - 11.30pm. In turn SP7 said that he kept the drug exhibit inside a locked steel cabinet in his room. On 24 June 2008 he brought the exhibits for fingerprint tracing. He said that he kept watch on them while being dusted for fingerprint and after that he took them back with him. Then on 26 June
- E 2008 at around 11.16am he gave the drug exhibit to SP3 for chemical analysis.
- F [53] It is therefore obvious that the drug exhibit was within the custody and care of SP7 during those dates. Anyway, there was no challenge by the defence during the trial that SP7 had left the drug exhibit outside his locked steel cabinet after taking them out for photographs and dusting for fingerprint. Such absence of challenge had deprived the prosecution the opportunity of rebuttal by way of police diaries and other relevant documents. To raise
- G therefore the issue at the appeal stage in our view is a little late in the day.

Conclusion

- H [54] With respect, we therefore find no reason to say that the courts below had misdirected themselves on the law in view of *Zaifull* case.
- I [55] Accordingly we find no merit in this appeal and we dismiss it. The conviction and sentence imposed by the courts below are affirmed.
-